(4)

No. 90-892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CITY OF SEATTLE,

Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER CITY OF SEATTLE

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February 8, 1991

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN SUPPORT OF THE PETITIONER CITY OF SEATTLE

Pursuant to Rule 36.1, the National Trust for Historic Preservation in the United States ("National Trust") respectfully moves for leave to file the attached brief as *amicus curiae* in support of the City of Seattle's Petition for a Writ of Certiorari to the Washington Supreme Court in this case. The City of Seattle has consented to the filing of the brief, as evidenced by the letter filed with the Clerk of this Court. However, Respondent First Covenant Church has not consented.

The National Trust is the leading national organization in the field of historic preservation. It was chartered by Congress in 1949 as a private, charitable, educational, and nonprofit corporation to "facilitate public participation in the preservation of sites, buildings and objects of national significance or interest" and to preserve and administer properties "significant in American history and culture." 16 U.S.C. § 468. In deciding to charter the National Trust, Congress intended that "[the National Trust] will mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources." S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S. Code Cong. & Ad. News 2285, 2288. It is in the spirit of this charter that the National Trust seeks to express its views in this case.

The National Trust has more than 230,000 individual contributing members nationwide, and approximately 3,000 member organizations involved in local and regional historic preservation activities. These members have a substantial interest in upholding and enhancing the effectiveness of local historic preservation laws. In addition to owning and maintaining historic properties, the National Trust furthers historic preservation by providing extensive advisory and technical services to local governments that have enacted landmark and historic district ordinances. The National Trust has worked closely with many of the more than 1,700 municipalities that have enacted such ordinances.

The National Trust's expertise on historic preservation law is nationally recognized, particularly with respect to the constitutional validity of local historic

preservation ordinances.[1] The National Trust has thus examined the issues presented in this case from a national perspective. It believes that historic preservation contributes fundamentally to the welfare and the vitality of this nation and that the decision in this case will have a significant impact on the regulatory authority of local governments to protect historic religious properties. The National Trust is concerned that wholesale exemptions from landmark designation for any category of historic properties, as distinct from case-by-case requests for relief in order to make specific changes in designated features of the property, will undermine the integrity of historic preservation laws without valid justification.

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[1] The National Trust participated as *amicus curiae* in this case before the Washington Supreme Court in support of the City of Seattle's motion for reconsideration. The National Trust also participated as *amicus curiae* in *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3433 (U.S. Dec. 10, 1990) (Nos. 90-899, 90-900), and *Society of Jesus v. Boston Landmarks Comm'n*, No. SJC No. 5415 (Mass. Dec. 31, 1990), which involve the applicability of preservation laws to religious properties. The National Trust is also a plaintiff in *Alger, et al. v. City of Chicago*, No. 90 C 2778 (N.D. Ill. Sept. 19, 1990), *appeal docketed*, No. 91-1029 (7th Cir., filed Jan. 3, 1991), which involves a constitutional challenge to a local ordinance exempting religious properties from landmark designation.

The National Trust has also participated as *amicus curiae* in the following cases before this Court involving local government land use regulatory authority: *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

For the reasons stated above, the National Trust respectfully requests that this Court grant its motion to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari filed by the City of Seattle in this case.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN SUPPORT OF THE PETITIONER CITY OF SEATTLE

INTEREST OF *AMICUS CURIAE*

The National Trust for Historic Preservation in the United States ("the National Trust") was chartered by Congress in 1949 as a private charitable, educational, and nonprofit corporation to "facilitate public participation in the preservation of sites, buildings and objects of national significance or interest" and to preserve and administer properties "significant in American history and culture." 16 U.S.C. § 468. The National Trust has more than 230,000 individual

members nationwide, and approximately 3,000 member organizations involved in local and regional historic preservation activities. In addition to owning and maintaining historic properties, the National Trust furthers historic preservation by providing extensive advisory and technical services to local governments that have enacted landmark and historic preservation ordinances.

STATEMENT

A. Introduction

While Americans have always treasured their history and traditions, it is only in the past 60 years that local, state, and federal laws have been expanded to protect our physical heritage—the nation's historic buildings, places, and neighborhoods. In the 1930s, the cities of Charleston, South Carolina and New Orleans, Louisiana adopted the first local historic preservation ordinances in the United States. By the 1960s, the threat of wholesale destruction of historic neighborhoods by urban renewal projects and highways had engendered a broad national historic preservation movement, and led to the adoption of the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, and the enactment of state and local historic preservation laws across the country.

By 1978, when this Court issued its landmark opinion in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 107 (1978), all 50 states and more than 500 local communities had enacted historic preservation laws; today that number has grown to more than 1,700.[1] *Penn Central* laid to rest any doubts

[1] *See infra* note 6.

about the constitutionality of the local regulation of historic landmarks, which enhance the quality of life for all. The decision of the Washington Supreme Court in this case presents a serious threat to these widespread local preservation efforts, by creating a wholesale exemption from the protections that would otherwise be afforded for historic properties owned by religious institutions.

Religious properties often have historic, community, and architectural significance that makes them particularly worthy of preservation. According to the National Park Service, 5,524 religious properties are listed in the National Register of Historic Places.[2] But this number tells only part of the story. In cities and towns across the country, churches and other religious buildings are often literal landmarks—giving residents and visitors a sense of the fabric of community life. Religious buildings often dominate the streetscapes and skylines, adding beauty and inspiration to many towns and neighborhoods. Religious buildings act as anchors in their communities, providing, in addition to their religious and spiritual missions, outreach to broad segments of the public for cultural enrichment, social services, and a variety of private sector activities.

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[2] Statistics provided on January 14, 1991, by Jon Byrn, Data Base Manager, U.S. Department of the Interior, Keeper of the National Register. Unlike the protections afforded by local landmark ordinances such as Seattle's, National Register listing provides protection only with respect to the actions of federal agencies, such as federally-funded highways or urban renewal projects, and non-federal activities that are regulated by federal licenses or permits. *See* National Historic Preservation Act, 16 U.S.C. §§ 470f, 470h-2.

Religious buildings also have played an important role in the history of our nation, from Boston's Old North Church, which signalled Paul Revere to start his historic ride, to the Ebenezer Baptist Church in Atlanta, where Rev. Martin Luther King, Jr. developed the moral precepts of the civil rights movement in the 1960s. More than perhaps any other category of buildings, religious properties are a vital component of our physical and social environment from coast to coast, from Park Avenue to Main Street.

B. Regulatory Framework

The Seattle Landmarks Preservation Ordinance creates a three-step process for protecting historic sites in Seattle. The first step is the nomination and review of a site for designation as a landmark. The designation decision is made by an expert agency—the Landmarks Preservation Board—based on specific criteria of historic or architectural significance, after a public nominating meeting and a public hearing on the designation. Seattle Mun. Code §§ 25.12.350-25.12.480 (App. 53a-59a).

The second step is to develop appropriate controls and incentives to preserve the significant features of the landmark. This is done by agreement with the owner where possible; otherwise upon the recommendation of a hearing examiner. These controls are then codified in a designating ordinance, which must be approved by the City Council. *Id.* §§ 25.12.490-12.25.660 (App. 59a-67a). The designating ordinance specifies the features of the landmark that will require the approval of the Landmarks Preservation Board prior to making any significant changes. *Id.* §§ 25.12.500-25.12.630 (App. 60a-66a). The ordinance specifically provides that in no event may the des-

ignation deprive the owner of a reasonable economic use of the property. *Id.* § 25.12.580 (App. 63a-64a).

The third step in the process comes into play if the property owner wishes to make changes in the protected features of the property. In order to do so, the owner must apply for a certificate of approval from the Seattle Landmarks Commission. *Id.* § 25.12.670 (App. 68a). An application for a certificate of approval is evaluated based on a number of factors, including the economic consequences of denying the certificate, the extent to which other alternatives are available to achieve the owner's objectives, and the extent to which the proposed alteration may be necessary to meet the requirements of another law. *Id.* § 25.12.750 (App. 71a-72a).

Virtually all preservation ordinances, including Seattle's, allow exceptions based on the particular circumstances of an individual property owner, but such exceptions are only allowed on a case-by-case basis, in the context of evaluating a concrete proposal to make changes in the landmarked property or to accommodate the specific needs of the property owner.[3] In fact, conflicts between the interests of property

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[3] The National Trust is aware of only one preservation ordinance that categorically exempts historic religious properties from landmark designation. The City of Chicago has enacted a broad exemption for religious properties from its landmarks ordinance. *See* Chicago Mun. Code § 21-69.1. This legislative exemption is currently being challenged as violative of the first amendment's establishment clause. *See Alger v. City of Chicago*, No. 90 C 2778 (N.D. Ill. Sept. 19, 1990), *appeal docketed*, No. 91-1029 (7th Cir., filed Jan. 3, 1991) (district court dismissed plaintiffs' claim on grounds that alleged harm to church was not yet imminent and therefore plaintiffs did not yet have standing).

owners and the goals of historic preservation are the exception rather than the rule. The primary objective of most landmark ordinances, including Seattle's, is to provide an administrative review process that facilitates dialogue and negotiation between the property owner and preservation experts, in order to assist the property owner in making sure that proposed alterations or changes in the property do not inadvertently or unnecessarily harm significant features of the property.

C. First Covenant's Challenge

This case well illustrates the problems of creating wholesale exemptions from preservation ordinances at the landmark designation stage. First Covenant Church has never alleged that it has any plans either to renovate, alter, or demolish its building, or to take any other action that would be regulated by the Seattle Landmarks Preservation Ordinance. The Church brought this case on the ground (among others) that the landmark designation of the exterior of its building, alone, substantially burdened its right to free exercise of religion. The Washington Supreme Court agreed, concluding that the "aesthetic and community values associated with landmark preservation" were "clearly outweighed" by the burden on the Church's free exercise rights. (App. 17a).

Significantly, the Church did not allege that the landmark designation had any impact—even a potential future impact—on its practice of religion. Rather, it alleged burdens of the sort that any property owner might encounter in connection with land use regulation: the burden that some future alteration proposal might require secular review; the burden, in connection with such a proposal, of paperwork, negotiations,

and hearings; and the burden of "uncertainty" as to whether approval of the proposal would be granted. (App. 5a)

Based on these asserted burdens, and essentially on the ground that a religious organization should not have to interact with secular authorities except on secular matters of compelling importance, the Washington Supreme Court effectively exempted buildings owned by religious institutions from landmark designation, without regard to any actual hardship or interference with the practice of religion. This religious exemption warrants review by this Court.

ARGUMENT

I. This Case Presents an Important Question Concerning the Authority of Local Governments to Protect Historic Properties Through Landmark Designation and Controls.

A. The Landmark Designation of Historic Buildings, Including Historic Religious Properties, Serves an Important Public Purpose.

The importance of preserving America's architectural and historic resources through the enactment of historic preservation laws has received increasing recognition during the last half-century. Beginning with our nation's first preservation ordinance, adopted by the City of Charleston, South Carolina, in 1931, state and local governments around the country have adopted laws that provide for the designation and protection of buildings, sites, and districts that embody exceptional architecture or make a significant contribution to our local, state, or national heritage.

On the local level, historic preservation is now a well-established and rapidly growing form of land use

regulation. This is evidenced by the dramatic increase in the number of communities that have adopted some form of historic preservation ordinance, rising from approximately 500 in 1978[4] to an estimated 1,500 in 1989.[5] In 1991, more than 1,700 communities in all 50 states provide legal protection for historic resources.[6] These historic preservation ordinances have proven to be an effective vehicle for protecting and preserving the best of our nation's heritage for future generations, thereby enhancing the quality of life for all. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 108-09 (1978).[7]

The importance of historic preservation has been recognized at the federal level as well. In 1966, Congress enacted the National Historic Preservation Act (NHPA), which established a national policy that "the historical and cultural foundations of the Nation

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[4] *See* National Trust for Historic Preservation, *A Guide to State Historic Preservation Programs* (1976), *cited in Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 107 n.1 (1978).

[5] *See* American Planning Ass'n, *Responding to the Takings Challenge*, Planning Advisory Service Report No. 416, at 23 (R. Roddewig & C. Duerkson eds. 1989).

[6] Statistics compiled by the National Park Service (February 1990), and updated by the National Trust for Historic Preservation (February 1991).

[7] In addition to the 1,700 local jurisdictions that have adopted historic preservation ordinances, every state government has enacted a historic preservation law, as this Court recognized in *Penn Central Transp. Co. v. City of New York*, 438 U.S. at 107. *See also* National Trust for Historic Preservation, *State Systems for Designating Historic Properties and the Results of Designation* (1987); National Trust for Historic Preservation, *State Enabling Legislation for Local Preservation Commissions* (1984).

should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." 16 U.S.C. § 470(b)(2).[8] The NHPA gives recognition to the critical role of local governments in the preservation of historic resources, through the Certified Local Government program. This program, administered by the National Park Service, allows local governments to share in their state's allocation of federal money from the Historic Preservation Fund if they have enacted comprehensive preservation ordinances that satisfy the criteria spelled out in 16 U.S.C. § 470a(c) and 36 C.F.R. Part 61. According to the National Park Service, 633 communities in the United States qualify as Certified Local Governments.

B. The Washington Court's Ruling Will Severely Disrupt the Regulatory Authority of Local Governments to Designate and Protect Historic Landmarks.

By declaring that the interest in preserving historic properties is "clearly outweighed" by the burden of submitting building plans for secular review, the Washington Supreme Court has effectively exempted religious buildings altogether from preservation ordinances. This decision has several unfortunate consequences.

First, if the view of the Washington Supreme Court is adopted in other jurisdictions, the decision could

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[8] Consistent with this policy, the NHPA strongly encourages the establishment of federal, state, and local programs for surveying and inventorying historic properties and nominating eligible properties for listing in the National Register of Historic Places, the list of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture. 16 U.S.C. § 470a.

have the effect of exempting thousands of buildings of historical and architectural significance—many of them true national treasures—from local preservation efforts solely because they are owned by religious institutions.[9] Without effective regulatory protections, there is no practical way for Seattle, or other cities and towns across the nation, to preserve these properties as living parts of their communities. As a result, our nation's religious buildings will become endangered.

Moreover, church buildings are often an integral part—and in many cases, the anchors—of the larger historic districts and neighborhoods that embody our heritage. Exempting religious properties from landmark protection leaves these buildings vulnerable to demolition, paving the way for the construction of parking lots or office towers in their place. The consequences to the physical and social fabric of these historic communities will be severe.

Nor are the implications of the Washington Supreme Court's decision limited to historic preservation. The "burdens" allegedly imposed by the landmark designation of First Covenant Church (i.e., paperwork, "uncertainty," and the necessity of interaction with secular authorities) are hardly unique

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[9] In fact, at least one other court has also been receptive to a free exercise challenge by a religious property owner under a state constitution. *See Society of Jesus v. Boston Landmarks Comm'n*, No. SJC-5415 (Mass. Dec. 31, 1990) (holding that landmark designation of the interior worship space of a church violated the free exercise clause of the Massachusetts Constitution, notwithstanding the fact that the landmarks commission had ultimately permitted the church to make the requested interior alterations.)

to landmark designation. If religious organizations cannot be required to interact with secular authorities and prepare secular "paperwork" except for the most compelling reasons, the authority of local governments to implement land use and other regulatory programs, including zoning laws, will also be threatened.[10]

Finally, the wholesale exemption sanctioned by the Washington Supreme Court is in no way necessary to accommodate changes that may be needed in order for religious property owners to carry out their religious and charitable programs. Like most such ordinances, Seattle's Preservation Ordinance provides a process for evaluating, on a case-by-case basis, proposals for changes to significant features of a designated landmark after the property owner makes a concrete proposal in an application for a certificate of approval. Only in the context of a concrete proposal for altering or demolishing the landmark is there any real ability to determine whether an exception is necessary to provide effective relief to the property owner, or whether alternative solutions may allow the property owner to more effectively utilize its building

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[10] As this Court recently noted in *Employment Division v. Smith*, 110 S. Ct. 1595 (1990):

> The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind. . . . The First Amendment's protection of religious liberty does not require this.

Id. at 1605-06 (citations omitted).

without destroying designated features of the landmark.[11]

Here, the Seattle ordinance provides a flexible administrative mechanism for the review of proposed changes to designated features of the landmark, taking into account the special financial or programmatic needs of the property owner. *Id.* §§ 25.12.490-25.12.660 (App. 59a-67a). Indeed, the designating ordinance for First Covenant Church itself illustrates this level of accommodation. The ordinance specifically requires the Landmarks Board to approve all religiously motivated alterations, i.e., for any exterior alterations "necessitated by changes in liturgy." (App. 83a). Thus, a wholesale exemption from preservation regulation is unnecessary to protect the legitimate interests of the Church.

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[11] For example, in *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3433 (U.S. Dec. 10, 1990) (Nos. 90-899, 90-900), the church's free exercise challenge was raised only after the New York City Landmarks Commission had reviewed and disapproved specific plans by the church to demolish its historic community house. *See also Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 296 N.E.2d 183, 505 N.Y.S.2d 24, *cert. denied*, 479 U.S. 985 (1986):

> The ultimate resolution of this constitutional issue—i.e., whether the Landmarks Law, as applied, prevents or seriously interferes with plaintiff's ability to carry out its charitable purpose—will require a careful examination of facts not yet developed pertaining to plaintiff's financial situation and to whatever action the Commission takes with respect to plaintiff's rebuilding program.

296 N.E.2d at 190-91 (citation omitted). This was also the rationale of the trial court in *First Covenant*, which concluded that the case was not ripe for review. (App. 30a-31a.)

II. This Case Raises a First Amendment Issue of National Significance.

A. This Decision is in Direct Conflict with Other State and Federal Court Decisions, and Disregards Important U.S. Supreme Court Precedents.

The Washington Supreme Court's decision conflicts directly with a recent decision of the Second Circuit in *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3433 (U.S. Dec. 10, 1990) (Nos. 90-899, 90-900) ("*St. Bartholomew's*"). In that case, the owner of a historic religious building in New York City challenged the landmarks commission's decision denying its request to demolish its landmarked community house in order to construct a 47-story office tower. The court held that the commission's denial of the demolition permit did not unconstitutionally impair the church's ability to carry out its religious mission.[12] *See also Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922 (N.Y. App. 1980) (landmark designation of religious organization's meeting house did not interfere with religious organization's free exercise of its religious activities).

The decision below, while in conflict with *St. Bar-*

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[12] The Second Circuit also held, applying this Court's holding in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), that the landmarks commission's actions did not unconstitutionally "take" the church's property without just compensation under the fifth amendment. The Washington Supreme Court's decision in *First Covenant Church* did not address the church's additional claim that landmark designation, alone, effects a "taking" of the church's property, presumably because *Penn Central* is dispositive on this issue.

tholomew's, in fact poses a broader and more important question. Here the question is whether the mere landmark designation of a church building violates free exercise rights, without regard to whether the property owner has been denied any particular use of the building, or whether the designation will result in actual hardship or interference with religious practice. The decision in *St. Bartholomew's*, by contrast, represents a balancing of competing interests in the context of a specific proposal to demolish a landmark.[13] If the decision of the Washington Supreme Court were correct, the issue in the *St. Bartholomew's* case would never be reached.

The Washington Supreme Court also failed to apply relevant Supreme Court precedents that specifically set forth the appropriate analytical framework for evaluating a free exercise challenge to neutral government regulation. This Court has repeatedly upheld the applicability of a variety of neutral government regulatory programs to religious institutions. These cases confirm that the financial and administrative consequences of landmark designation simply do not create a judicially cognizable burden on free exercise rights. *See, e.g., Jimmy Swaggart Ministries v. California Board of Equalization*, 110 S. Ct. 688, 696-97 (1990) (the free exercise clause does not guarantee that religious groups will be free from all financial and administrative burdens of government); *Hernan-*

[13] While affirming the legitimate authority of local governments to regulate historic religious properties, the *St. Bartholomew's* decision does not close the door on free exercise claims by religious property owners, where a landmarks commission oversteps its bounds and bars an activity central to the property owners' expression of religious faith, or where the owner is unable to use the building to carry out its religious mission.

dez v. Commissioner, 109 S. Ct. 2136, 2147-48 (1989) (disallowance of tax deduction for religious auditing and training services did not constitute a substantial burden on free exercise rights); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 304-05 (1985) (recordkeeping and "paperwork" requirements of Fair Labor Standards Act did not burden the free exercise rights of individuals associated with religious foundation).

The Washington Supreme Court disregarded this Court's establishment clause rulings as well. As the Court recognized in *Jimmy Swaggart*, the mere necessity for interaction with the state resulting from governmental regulation does not result in excessive government entanglement under the first amendment. *Jimmy Swaggart*, 110 S. Ct. at 697-99. *See also Tony and Susan Alamo Foundation*, 471 U.S. at 305-06. Thus, the alleged interference with the Church's freedom to alter the exterior of the church structure by requiring proposed changes to be reviewed by the Seattle Landmarks Commission, and any present "uncertainty" such review may engender, cannot be characterized as an infringement of protected first amendment interests.

Finally, this Court's recent decision in *Employment Division v. Smith*, 110 S. Ct. 1595, 1600 (1990),[14] firmly rejected the approach embraced by the Washington Supreme Court of requiring the City to demonstrate a "compelling" governmental interest in

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[14] *Smith* was decided after the Washington Supreme Court's original decision in *First Covenant*, but nearly five months prior to the court's decision to deny reconsideration.

order to regulate historic religious properties.[15] In *Smith*, this Court held that the "compelling interest test" was not applicable to free exercise challenges to valid and neutral laws of general applicability, stating:

> To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the state's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.

110 S. Ct. at 1603 (footnote and citation omitted). The Washington Supreme Court, by contrast, concluded that the "aesthetic and community values associated with landmark preservation" were "clearly outweighed" by the infringement on the church's free exercise rights. (App. 17a).[16]

The "interference" and "uncertainty" resulting from the landmark designation alleged by the Church in no way burdens or infringes the religious practice of any individual, but merely subjects First Covenant as an institutional property owner to a reasonable,

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[15] The Washington Supreme Court referred to the "compelling interest" test as "strict scrutiny." (App. 10a-11a).

[16] In fact, the Washington Supreme Court did not even correctly apply the compelling state interest test as enunciated in cases such as *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). The question of whether the government regulation serves a compelling government interest is reached only if the regulation places a "*substantial* burden on the observation of a *central* religious belief or practice." *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2148 (1989) (emphasis added).

neutral, government police power regulation of the exterior of its church building. Accordingly, the injuries alleged by First Covenant simply do not satisfy the standards for first amendment violations established by this Court.

B. Landmark Designation is a Neutral Regulatory Scheme and is Therefore Not Properly Reviewed Under the Compelling Governmental Interest Standard.

The Seattle Landmarks Ordinance is clearly a "valid and neutral law of general applicability" entitled to presumptive validity under this Court's decision in *Employment Division v. Smith*, 110 S. Ct. at 1600 (citation omitted). The question of whether comprehensive historic preservation ordinances place discriminatory and arbitrary burdens on affected property owners has already been decided by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978):

> In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city. . . .
>
> Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective. . . ."

Id. at 132 (footnote omitted).

Contrary to the Washington Supreme Court's suggestion, the fact that the Seattle Landmarks Preservation Ordinance is specifically applied to religious buildings does not remove the presumption of validity

that neutral regulatory laws are otherwise accorded. The Second Circuit specifically rejected this view in *St. Bartholomew's*, holding instead that "[t]he Landmarks Law is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions." 914 F.2d at 354. The court explained:

> It is true that the Landmarks Law affects many religious buildings. . . . Nevertheless, we do not understand those facts to demonstrate a lack of neutrality or general applicability. Because of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive, many religious structures are likely to fall within the neutral criteria—having "special character or special historical or aesthetic interest or value"—set forth by the Landmarks Law. This however, is not evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites.

Id. (citation omitted). Because the Seattle Landmarks Preservation Ordinance is a neutral government regulation of general applicability, it should be deemed presumptively valid against the free exercise challenge raised by the First Covenant Church.

CONCLUSION

The danger of the Washington Supreme Court's decision lies in its potential to sanction wholesale exemptions for religious properties from landmark ordinances, without any individualized inquiry into the extent to which the regulations impose genuine hardship or restraints on religious practice. Such exemptions are in no way necessary to protect the legitimate

interests of religious property owners. To the contrary, such exemptions would threaten the authority of local governments to implement land use regulation and, indeed, a number of neutral regulatory programs that may require religious organizations to interact with secular authorities. Accordingly, for the foregoing reasons, the National Trust respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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